

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA)	
)	
v.)	NO.: 3:08-cr-142
)	JUDGES PHILLIPS/SHIRLEY
)	
DAVID C. KERNELL)	

MOTION TO DISMISS COMPUTER FRAUD COUNT
AND ITS FELONY ENHANCEMENT

Comes the Defendant, DAVID C. KERNELL, by and through counsel, North Carolina v. Pearce, 395 U.S. 711, 717 (1969); the Fifth Amendment to the U.S. Constitution, and hereby moves the Court for an order dismissing Count 3 of the Superseding Indictment because it improperly attempts to transform a misdemeanor allegation into a felony.

In support of this motion, Mr. Kernell would show as follows:

1. Count 3 of the Superseding Indictment charges David Kernell with violating 18 U.S.C. § 1030. While unauthorized access to a protected computer is generally a misdemeanor, the indictment seeks to impose felony liability on Mr. Kernell based on the allegation that he committed the offense in furtherance of another violation of the same statute and invasion of privacy, a Tennessee civil tort.
2. Count 3 fails to state a felony offense because it is improper to aggregate misdemeanor charges into a felony.
3. A state law civil cause of action in tort is insufficient to support a federal criminal felony enhancement.

4. Count 3 fails to state a claim because it does not contain the essential elements required under the statutes.

5. In further support of this motion, Mr. Kernell relies on the accompanying memorandum of law.

WHEREFORE, Mr. Kernell moves this Court to enter an Order dismissing Count 3.

Respectfully submitted this 11th day of May, 2009.

RITCHIE, DILLARD & DAVIES, P.C.

/s/ WADE V. DAVIES
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been filed electronically this 11th day of May, 2009. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

/s/ Wade V. Davies
WADE V. DAVIES